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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF THE ARIZONA TRIAL LAWYERS ASSOCIATION, THE CALIFORNIA TRIAL LAWYERS ASSOCIATION, AND THE NEVADA TRIAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST

With the consent of the parties, the Arizona Trial Lawyers Association; the California Trial Lawyers Association; and the Nevada Trial Lawyers Association respectfully submit this brief as amici curiae in support of appellee. The copies of the letters of both parties confirming this consent have been filed with this Court.

The Arizona Trial Lawyers Association ("AzTLA"), founded in 1969, is a voluntary organization comprised of approximately 875 trial lawyers. The California Trial Lawyers Association ("CTLA"), founded in 1962, is a voluntary organization comprised of approximately 5,000 trial lawyers. The Nevada Trial Lawyers Association

("NTLA"), founded in 1966 is a voluntary organization with over 800 members.

Members of these associations regularly appear in both state and federal court. The predominant practice of most AzTLA, CTLA, and NTLA members is in the representation of injured tort victims and victims of consumer fraud.

These Associations, through their appropriate officers and committees, have authorized the participation in this case as amici curiae.

Amici are concerned that the position taken by appellants and amici counsel, in support of appellants, is another attempt to tamper with state tort law remedies which have been the only effective means of curbing oppressive insurance claims practices and deterring other commercial torts.

The insurance industry's attempt to restrict or eliminate punitive damages, the strongest deterrent to tortious conduct, shows that, unfortunately, major insurers are more interested in profits than in preventing wrongful and tortious misconduct towards policyholders.

We believe that a reversal of the decision of the Supreme Court of Mississippi would harm large segments of our society and would violate fundamental principles of our federalism.

SUMMARY OF ARGUMENT

For more than a century, punitive damages have been a legitimate and accepted component of state tort law. Punitive remedies have been developed by the individual states in response to each state's policies and needs to deter aggravated misconduct. Though there has been some variation among the states, punitive damagaes have developed and have been controlled by the states within traditionally accepted principles and guidelines. Such

remedies continue to evolve as a legitimate expression of state regulation and civil justice.

Punitive damages have developed in particular as the most effective means by which the states can protect their citizens against corporate misconduct. They have been especially important in controlling the powerful and largely unregulated insurance industry. Far from creating a "crisis" in the insurance industry, such damage assessments by state courts are playing a crucial role in reforming long standing claims abuses. The industry's dislike of such awards is not a legitimate reason to tamper with state tort law and upset basic values of our system of federalism.

ARGUMENT

I. IT IS A STATE'S RIGHT TO DETERMINE ITS TORT LAW, AND THE RULES AND METHODS OF COMPENSATION AND PENALTIES WITHIN THAT TORT LAW.

This Court has often recognized that regulating undesirable conduct within its borders is the province of the State, and that therefore a State's interest in fashioning its rules of tort law is "paramount." *Martinez v. State of California*, 444 U.S. 277, 282, 100 S.Ct. 553, 557, 62 L.Ed.2d 481 (1980). Such recognition has included not only "the States' traditional authority to provide tort remedies to their citizens," *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984), but also the recognition that punitive damages are an accepted and legitimate part of traditional state tort law. 464 U.S. at 255, 104 S.Ct. at 625.

In *Silkwood*, the Court upheld an award of punitive damages under Oklahoma law for wrongful conduct by a corporation operating a nuclear power plant even though the defendant was also regulated to some degree by the federal Nuclear Regulatory Commission, and subject to federal fines. In so doing, the Court affirmed the

punitive award as a legitimate regulatory function of the State. *Id.*

The remedy of punitive damages was discussed at length by the Court in *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632. In its decision affirming an award of exemplary damages under 42 U.S.C. § 1983, the Court had occasion to review the common law of torts both in modern times and at the time the statute was enacted. The majority opinion noted that the doctrine of punitive damages had been "accepted as settled law by nearly all state and federal courts, including this Court," as far back as the latter part of the last century. *Id.*, 461 U.S. at 35.

While explaining its decision in *Smith* affirming an award of punitive damages for conduct amounting to reckless or callous disregard, the Court discussed the fact that the various states had formulated slightly varying standards for exemplary awards. *Id.*, 461 U.S. 47-48. Recognizing that some states actually required ill will or intent to injure before allowing punitive awards, the Court adopted the view of the *Restatement (Second) of Torts* in conjunction with 42 U.S.C. § 1983 actions, endorsing exemplary damages when a defendant demonstrates "reckless indifference to the rights of others." 461 U.S. 46-51.

In his dissent, Justice Rehnquist argued that, where the cause of action was based on federal statute, a wrongful intent requirement was appropriate before punitive damages could be awarded. Even Justice Rehnquist, however, noted that his reasoning did *not* apply with equal force in regard to a state's legitimate formulation of tort law and remedies, including punitive remedies:

> While state courts may choose to adopt such measures as they deem appropriate to punish officers [parties] of the jurisdiction in which they sit, the standards they choose to adopt can scarcely be taken

> as evidence of what it is appropriate for a federal court to do.

Id., 461 U.S. at 92.

Preventing and punishing wrongdoing within their borders has always been "much more the business of the States than it is of the Federal Government." *Patterson v. New York*, 432 U.S. 197, 201, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977). Thus, a state's ability to fashion its own tort law is, and has always been, a basic component of our federalism.

Bankers Life, under the guise of arguing constitutional protections, would have the Court abandon that federalism and restrict or eliminate punitive damage remedies formulated by the states. Such an invasion of the states' function and province is neither necessary nor justified by the alleged concerns of the insurance company.

As will be shown on the following pages, the states' punitive damage remedies have proven a vital and effective means of curbing corporate misconduct in the various states, particularly against the all-powerful, and largely unregulated insurance industry. Further, the howls of protest voiced by the industry in connection with the issue are both overstated and unjustified.

II. PUNITIVE DAMAGES HAVE EVOLVED AND BEEN REFINED THROUGH STATE TORT LAW TO BE AN EFFECTIVE MEANS OF DETERRING MISCONDUCT.

In *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), this Court recognized that "having the power to make decisions and to set policy is what gives the State its sovereign nature." 456 U.S. at 761. The Court went on to note that the ability of a state "to consider and

promulgate regulations of its choosing must be central to a State's role in the federal system." *Id.*

An important rationale for that view of the State's role is set forth in the concurring and dissenting opinion of Justice O'Connor:

> Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.

Id., 456 U.S. at 788.

That is precisely what has occurred in the area of exemplary damages. State courts throughout the country have developed punitive damages to meet particular situations. Punitive damage law has been a somewhat flexible doctrine, applied in the various states with appropriate guidelines and standards to effectuate its purpose. (See discussions by both the majority and dissent in *Smith v. Wade, supra,* recognizing the variations among the various states over time in regard to punitive awards.)

Punitive damage law, like tort law in general, has evolved and progressed in the various states in accordance with the needs of the people and the resources of the civil justice system in those states. The flexibility of the states to develop the doctrine has been reflected not only in the standards for such awards, but in the manner in which such awards have been authorized.

Punitive damages, for example, are a product of the common law in Arizona.[1] In California and Nevada punitive damages are based on statutory authority.[2] In the latter states the people have spoken through elected

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[1] *Hawkins v. Allstate Ins. Co.*, —— Ariz. ——, 733 P.2d 1073 (Ariz. 1987).

[2] Cal. Civil Code, § 3294; Nev. Rev. Stat. § 42.010.

representatives to establish punitive damages and the standards for such damages. In Arizona the people have spoken through their courts to establish the remedy of punitive damages and the standards for such damages.[3]

Although the standard of misconduct justifying punitive damages in each of the aforesaid states may vary somewhat, they all have a common denominator of requiring aggravated or intentional misconduct.

While every state has established its own factors and guidelines for the jury to consider in determining the amount of a punitive damage assessment, a common requirement is that the size of the award be related to the wealth of the defendant.[4] That is necessarily true if the award is to furnish an effective deterrent to such conduct in the future. As stated in *Pistorius v. Prudential Insur. Co.*, 123 Cal.App.3d 541, 554, 176 Cal.Rptr. 660 (1981):

> [The] function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.

In reference to "cases involving deceptive business schemes operated for profit and often victimizing numerous members of the public," the Idaho Court noted:

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[3] Examples of punitive damage authority and standards from the three state lawyer associations represented in this brief are being used for illustrative purposes.

[4] In Arizona, factors include such things as wealth and income of the defendant, the extent of the misconduct, the duration of the misconduct, the harm caused and the profitability of the misconduct. *Hawkins, supra.* In California, the factors to be considered in assessing punitive damages are the particular nature of defendant's acts and the wealth of the particular defendant. *Neal v. Farmers Ins. Exchange*, 148 Cal.Rptr. 389, 582 P.2d 980 (1978). In Nevada, the factors to be considered in assessing the amount of punitive damages are the wealth of the defendant, the wrongfulness of the acts, and "the punitive amount that would promote the public interest without financially annihilating the defendant." *Nevada Cement Co. v. Lemner*, 89 Nev. 447, 514 P.2d 1180 (1973); *Hale v. Riverboat Casino, Inc.*, 100 Nev. 299, 682 P.2d 190 (1984).

> Clearly in such cases the award of exemplary damages should aim at making the cost of such repetitive antisocial conduct uneconomical. . . . A generous award of exemplary damages served to remove the profit factor from the whole scheme. . . .

Cox v. Stolworthy, 94 Idaho 683, 496 P.2d 682, 690 (1972).

Recently, there has been a trend in several of the states to raise the standard for reprehensible conduct on the part of the defendant which must be established before a punitive award will be allowed. For example, while this Court recognized in *Smith v. Wade, supra*, the propriety in a federal case for awarding punitive damages based on a "recklessness" standard, Arizona has rejected "recklessness" as sufficient grounds for such an award. Arizona now requires proof that defendant acted with an evil mind. The requisite evil mind is found only if the defendant intended to injure the victim, or "consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to the [plaintiff]." *Hawkins v. Allstate, supra.*[5]

Some states, on policy grounds, have also required plaintiffs to meet a higher burden of proof before an award of exemplary damages will be allowed. Wisconsin and Arizona are both examples of states which have adopted a "clear and convincing evidence" burden of proof for punitive damages.[6]

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[5] Similarly, both California and Nevada require stricter standards in order to justify punitive awards. Statutes in both California and Nevada permit punitive damages only if there is "fraud, malice or oppression," Cal. Civil Code § 3294; Nev. Rev. Stat. § 42.010. Mississippi uses the "recklessness threshold"—the test approved by this Court in *Smith v. Wade, supra.*

[6] Both states, after considering the history of reliance upon the previous "preponderance" standard, as well as the burden upon the courts if every punitive damage case were required to be retried, applied the higher standard *prospectively*—that is, to cases which

The clear picture which emerges is that the individual states have acted responsibly and responsively in formulating punitive damage law in conformance with the goals and objectives of each individual jurisdiction.

III. PUNITIVE DAMAGES HAVE DEVELOPED AT THE STATE LEVEL AS THE ONLY EFFECTIVE PROTECTION AGAINST FRAUD AND OPPRESSION BY CORPORATE GIANTS.

Governmental sanctions over the years have been notoriously inadequate in curbing corporate wrongdoing. That is no doubt due, in part, to a corporation's immunity from the threat of criminal prosecution with its inherent weapons of loss of liberty and personal humiliation. In those rare cases where individual officers of corporations have been prosecuted, punishment has been woefully lax in comparison with the enormous amounts of money to be gained by wrongful activity. A study in *U.S. News and World Report* entitled "Corporate Crime —The Untold Story," September 6, 1982, at 25-28 states:

> In comparison with the prison terms routinely dealt out to robbers and muggers, corporations and their executives, like other white-collar criminals, get off easy. Most offenses with which corporations are charged carry low fines that have not changed in years and, at worst, are minor irritants.
>
> . . . .
>
> When Westinghouse Electric Company pleaded guilty in 1978 to charges involving bribery of an Egyptian official, the maximum fine was $300,000—one percent of the value of the 30-million-dollar contract it had obtained.
>
> . . . .
>
> Even when convicted and punished, it is not unusual for an executive to be welcomed back into the company's hierarchy.

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had not yet been tried at the time of announcement of the new rule. *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 458 (1980); *Hawkins v. Allstate*, 733 P.2d at 1080.

For citizens of the states, punitive damages represent the only realistic protection against fraud, oppression and intentional injury by corporate giants. The average consumer or insured who is cheated or lied to can rarely afford to protect himself or obtain justice because actual damages will not support the legal expense of bringing the wrongdoer to justice.

In the corporate world, as everywhere else, there are examples of good and bad. As stated by Robert Miles, Associate Professor of Business Administration at Harvard University, "some firms are 'real Neanderthals,' money-grubbing and ethically insensitive, while others are law-abiding and socially conscious." *Id.*

In certain areas, misconduct has been especially widespread:

> In a few instances, almost entire industries have been caught breaking the law.
>
> . . . .
>
> When a corporation gets into trouble, whether the charge is price fixing, bribery, kickbacks, tax evasion or pollution, the frequent explanation is: "Everybody does it." It is an idea that soothes the consciences of the culprits, and sometimes it is almost literally true. (*Id.*)

In such situations, where a corporate defendant has acted, and continues to act, in violation of the rights of a large group of people solely for the calculated purpose of making more money, punitive damage awards by state courts are the only effective remedy. In *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 233 N.Y.S.2d 488 (1961), the Court observed:

> One who acts out of anger or hate, for instance, in committing assault or libel, is not likely to be deterred by the fear of punitive damages. On the other hand, those who deliberately and cooly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and

> consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Id., 10 N.Y.2d at 406, 179 N.E.2d at 499, 223 N.Y.S.2d at 492. *See also, Boise Dodge v. Clark,* 92 Idaho 902, 453 P.2d 553 (1969).

Such awards are especially essential where compensatory damages are small in relation to the defendant's wealth and can be readily absorbed as a cost of doing business. Our state courts have recognized the importance of punitive damages under such circumstances. *Ward v. Taggart,* 51 C.2d 736, 336 P.2d 534 (1959), noted:

> Courts award exemplary damages to discourage oppression, fraud, or malice by punishing the wrongdoer. (See McCormick, *Damages,* § 279; *Morris, Punitive Damages in Tort Cases,* 44 Harv.L.Rev. 1173, 1185-1188.) . . . Such damages are appropriate in cases like the present one, where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained.

Id., 51 C.2d at 743, n. 14-15.

As will be discussed in the following section, that is especially true in regard to the insurance industry.

IV. PUNITIVE DAMAGES UNDER STATE TORT LAWS ARE AN EFFECTIVE MEANS OF DETERRING CORPORATE MISCONDUCT AND THE ONLY REALISTIC PROTECTION FOR CONSUMERS FROM DISHONEST AND OPPRESSIVE INSURANCE PRACTICES.

The increase in punitive damage assessments against corporations can, in large measure, be attributed to the increase in insurance bad faith litigation. From the reported cases it appears that fraudulent, malicious and oppressive conduct by insurance carriers runs rampant.

Sometimes the attitude of the companies is one of defiance and contempt when courts try to encourage fair and reasonable claim practices. In *Tibbs v. Great American Ins. Co.*, 755 F.2d 1370, 1376 (9th Cir. 1985), the company's response to the judge's advice to provide legal defense on a claim, was "F--- the Judge," and "no court of law is going to tell us what to do." Punitive damages can help remove an aura of arrogance and insolence that has permeated the industry.

The insurance industry has remained free of federal regulation through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which effectively eliminated federal regulation by transferring responsibility to the states.[7]

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[7] In *Paul v. Virginia*, 75 U.S. 168 (1868), this Court removed insurance from the field of federal regulation through the Commerce Clause, thereby leaving the matter to the state courts and state insurance commissioners. Ashley, *Bad Faith Actions*, § 9:02, explains that thereafter:

> The latter proved ineffective in controlling insurance abuses: the commissioners usually came from the ranks of the insurance industry and, after short tours of duty, returned to the companies they had regulated.
>
> In 1944, however, the Supreme Court issued its decision in United States v. South-Eastern Underwriters Association. . . . This decision sent shivers down the spines of insurance company executives, who feared the prospect of federal agencies,

Any effective regulation or control of the insurance industry by state insurance departments has remained notably lacking. *See* the Controller General's *Report to the Congress of the United States*, PAD 79-72, Oct. 9, 1979; *see also, N.B.C. Reports*: "Protection for Sale; the Insurance Industry," dated April 17, 1982, an in-depth study of the inability of state insurance departments to properly regulate the insurance industry. The study noted that the insurance industry was too large for any state administrative agency to control, and that:

> WE FOUND ALMOST EVERYWHERE WE WENT—STATE REGULATORS DOING AN INEFFECTIVE JOB. THE FEDERAL GOVERNMENT HAS SHOWN FOR DECADES THAT IT HAS LITTLE INTEREST IN GETTING INVOLVED. AND SO, CONSUMERS END UP HAVING TO TAKE ON THIS SPRAWLING INDUSTRY LARGELY BY THEMSELVES. IT IS NOT A FAIR MATCH. . . .(Capitalization in original.)

Id. at 74.

Insurance company practices as disclosed by reported cases can only be described as shocking in view of the fact that it is an industry affected with a public interest; an industry which represents that it will afford protection in a time of need. The courts have assessed punitive damages based on conduct which was dishonest, malicious and outrageous: *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073 (Ariz. 1987). [For over 18 years the company taught adjusters to cheat by "chiseling" small amounts on claims because policyholders would not perhaps object to these small deductions and it would profit the company by millions each year]; *Moore v. American*

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particularly the Federal Trade Commission, interfering with the insurers' cozy relationships with the state insurance commissioners.

The insurance industry devised an ingenious plan to head off federal regulation. It persuaded Congress to introduce legislation, known as the McCarran-Ferguson Act. . . .

United Life Ins. Co., 197 Cal.Rptr. 878, 150 Cal.App.3d 610 (1984). [Disability insurance benefits denied by use of misleading and deceptive settlement practices firmly grounded in an established company policy that had the potential of defrauding countless insureds other than plaintiff]; *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 693 P.2d 348 (1984). [Disability and medical insurance benefits withheld despite Aetna's interoffice memos indicating its position was questionable—only after insured's suicide was the file marked "urgent" and nine months of withheld benefits paid]; *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984). [A large judgment in excess of liability policy limits when "Allstate wilfully manipulated its own client," and "deliberately concealed adverse reports . . . from their own insured"]; *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972). [Life insurer's practice was to not pay meritorious claims and to use "economic coercion" to "compromise" valid claims.]

In an early article recognizing the problem along with a practical solution, Professor Thomas F. Lambert, Jr., 35 *ATLA L.J.*, at 224-226, stated:

> Even if Calvin Coolidge was right that "the business of America is business," corporate enterprise does not have a free lance and must fight with the sword of the warrior and not the dagger of an assassin. The logic of the problem at hand is simple. A person who buys life, health and accident, disability or liability insurance is a consumer and deserves legal protection which is realistic. If the law does not vindicate his reasonable consumer's expectations until only years after battling well-heeled corporate entities and then only gives him policy proceeds (plus interest) from which he must deduct the contingent fee and gnawing expenses of litigation, then the insurance industry has every illicit incentive in the word to fight the Bad Fight and nothing to lose (but policy proceeds plus interest). In this context, compensatory and contract damages don't really compensate. As shown by the modern cases and commen-

> taries cited above, redress is readily at hand. Reparation plus admonition are urgently required, and the law must play professor to a recalcitrant industry by the imposition of deserved civil punishment via punitive damages.

Punitive damages help to give policyholders some semblance of protection. The importance of punitive damages is summarized in an article entitled, "Insurance Company Bad Faith Law—A Potent Weapon for Consumer Protection," by William M. Shernoff, *Trial*, May 1981, at 24, as follows:

> [T]he imposition of punitive damages in a handful of bad faith cases in California has without a doubt generated a more thorough review by the insurance industry of its claims practices than was accomplished by ten years of legislative efforts to regulate insurance claims practices. . . .

Punitive damages have played an "increasingly significant role in protecting contemporary society from many non-regulated or inadequately regulated businesses and industries . . . ." Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613, 615 (1979).

These societal goals are being reached through the use of sanctions, the cost of which is being borne by the wrongdoer and not society. Professor Levine explains:

> Comparing the regulatory function of punitive damage verdicts to the function of "regulatory" agencies reflects the effective simplicity of exemplary damages rules of law administered by judges and jurors and the ineffective complexity in the maize of administrative agencies and regulations. Paradoxically, from an economic perspective, the cost of regulation through a punitive damage sanction is borne by the insurer acting wrongfully and not by taxpayers supporting an ineffective administrative agency.

Levine, *supra*, at 627 (1979).

As a result of these verdicts, insurers who were being inadequately regulated by administrative agencies are now being regulated and the conduct of the entire insurance industry is being reformed to conform to the reasonable interests and expectations of the public.

V. THE PUNITIVE DAMAGE REMEDY AS PART OF STATE TORT LAW HAS NOT CREATED A "CRISIS" AS CLAIMED BY THE INDUSTRY.

The Appellant and Amici "cry wolf" by expressing outrage and concern over punitive damage assessments. The most recent analysis of the "crisis" by a business publication states:

> During the 1986 crisis, the industry embarked on a splashy public relations campaign proclaiming that the "insurance crisis" was really a "lawsuit crisis." Some three dozen states did make minor changes in the law. But the insurance crisis has abated without help from an overhaul of the nation's civil justice system.
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> Cool analysis is discrediting last year's horror stories about an epidemic of multimillion-dollar jury awards for relatively little cause. In a sample of 359 cases in the 1982-85 period, mostly involving product liability, *punitive damages were "insignificant,"* according to a study published by the American Enterprise Institute. *"The civil litigation system is stable,"* says Mark Peterson of the Rand Institute for Civil Justice. Only in mass toxic tort cases, notably those involving asbestos, is potentially enormous cost a real concern. (Emphasis supplied.)

Business Week, May 25, 1987, Finance-Insurance at 123. The industry's alleged punitive damage "crisis" is no more legitimate than the industry's claims of financial distress.[8]

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[8] An investigation by the Government Accounting Office, Congress' investigative arm, found that the insurance industry was healthy and that insurers earned after tax profits of 19 Billion Dollars in 1986, when the insurance "crisis" was at its peak. "The

Other studies, such as the Preliminary Report of the Punitive Damages Project by the American Bar Foundation in 1986 used a statistical analysis and found the following:

> Perhaps what is most interesting . . . in light of the claims made about the incidence of punitive damage awards, is how low the percentage of punitive awards is in a number of sites. For instance, the percentage of reported verdicts in which the plaintiff wins money that include punitive awards is only 1.6% in New York City (all five counties making up New York City combined), 2.2% in Cook County, Illinois (which includes Chicago), and 8.6% in Los Angeles County, California. These three sites represent the three largest cities in the country, and they do not appear, generally speaking, to be facing a punitive damages storm. Punitive damages, in terms of their incidence, are unusual in these sites.
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> These tables reflect one particularly important consistency—punitive damages are not routine across all causes of action (this, or course, may be driven in part by differences in the law). The higher percentages of reported verdicts in the money that include a punitive award are clustered, typically, in a small set of causes of action: personal violence, fraud, false arrest, and insurance bad faith. . . .
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> [T]hese preliminary findings are sufficient to call into question many of the claims made in both professional circles and the mass media about punitive damages as well as the civil justice system generally. Punitive damages are not, in the sites we have studied

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industry's earnings improved from $9.7 billion in 1985 to about $19 billion in 1986." Statement of Wm. J. Anderson, Assistant Comptroller General, General Government Programs, U.S.G.A.O. before the Subcommittee on Commerce, Consumer Protection and Competitiveness, House Comm. on Energy and Commerce, April 21, 1987, page 4.

> at least, routine, nor are they necessarily awarded in amounts that boggle the mind. Relatively high percentages of verdicts with punitive damages appear in only a few sites, yet the median awards are relatively low in these sites. Punitive damages appear to be clustered in certain types of cases, ones that might be expected given the purposes of punitive damages. Extremely high dollar awards do not appear to be the norm, and they tend to appear in only a handful of causes of action which do not account for large proportions of the case load and in which plaintiffs are not as likely to win any money at all. . . .

The insurance industry's concern over the number and size of punitive damage verdicts is misplaced. Given the state of the economy and particularly the healthy financial condition of the insurance industry, it would be expected that the amounts of such verdicts would increase each year. Every state has standards for assessment of punitive damages. One of the universal standards is that in determining the amount necessary to deter, the wealth of the defendant may be considered. Indeed, for punitive damages to fulfill the function of deterrence, it is necessary that such an assessment be considered in relation to the wealth of the defendant. "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." *Bertero v. National General Corp.*, 13 Cal.3d 43, 529 P.2d 608, 624 (1974).

An examination of the financial history of major insurance companies readily explains why the punitive damage trend would necessarily increase in amount if the deterrent purpose of such damages is to be accomplished. For example, one company which writes virtually every line of insurance, has tripled its wealth in the past 10 years from 1.4 Billion to over 4 Billion Dollars. Its 10 year financial history is as follows:

ALLSTATE INSURANCE COMPANY

Year	Net Worth "Surplus" (In Dollars)
1977	1,399,495,467
1978	1,693,533,517
1979	1,981,089,058
1980	2,371,135,879
1981	2,395,168,905
1982	2,822,168,434
1983	3,197,752,369
1984	3,229,029,379
1985	3,676,523,111
1986	4,081,689,528

Source: Best Insurance Reports, and the 1986 Allstate Annual Financial Statements filed with the Arizona Department of Insurance.

Using an insurer's present net worth of 4 Billion Dollars, a punitive damage assessment of $1,000,000 for fraud or malice or intent to harm could hardly be considered excessive. The same ratio of punishment to a person with net worth of $10,000 would be $2.50; to a person with a net worth of $100,000 would be a punitive assessment of $25.00; and to a person or company with net worth of $1,000,000, an equivalent punitive assessment would be $250.00. Insurance companies cannot be given preferential and unequal treatment merely because they possess great wealth.

Increases in the number and amount of punitive damage verdicts would also be expected over the past 10 years because of the evolution of the law and the increased awareness and knowledge by the courts of commercial torts. Not only has there been heightened recognition that intentional and profitable civil misconduct should not be protected or condoned, but the civil justice system through reported decisions has educated the courts regarding dishonest business schemes which were not rec-

ognized 10 or 15 years ago. Each reported insurance bad faith case seems to uncover additional schemes used to cheat policyholders of the protection they had purchased.

An example is an unfair claims practice which was discovered seven years ago in a state which did not recognize insurance bad faith. The practice therefore went unpunished. *Hoffman v. Allstate Ins. Co.*, 85 Ill.App.3d 631, 407 N.E.2d 156 (1980). In *Hoffman*, the company used a "cleanup" deduction on a total loss auto collision claim to reduce pay-out, and got away with it, as explained in the case:

> [O]ne of the defendant's adjusters, Jack Dooley, informed plaintiff that defendant deemed the car a total loss; he tendered and plaintiff accepted a check for $116.37 in full payment of the loss pursuant to the collision coverage. . . . Dooley explained . . . this figure; included . . . deduction of $55 which Dooley said was for "dealer preparation and shampoo," . . . . When plaintiff asked Dooley why such a deduction was made on a totally destroyed car, Dooley responded with words to the effect that "Allstate always does that." The check was returned uncashed to defendant on October 20, 1978. Plaintiff twice requested the location of the car for the purpose of having it appraised and apparently was never given this information.

Id. 407 N.E.2d at 157.

The Illinois Appellate Court, not recognizing insurance bad faith, affirmed the lower court dismissal of tort claims and punitive damages, and stated:

> Count III sounds in tort for fraud, alleging that defendant made "spurious" deductions from the retail value of the car and induced the plaintiff to accept the $116.37 check by representing those deductions as being legitimate.
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> . . . .
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> [P]laintiff returned the $116.37 check to defendant uncashed. Consequently, no apparent injury re-

> sulted from any purported reliance on defendant's representations, and the dismissal of Count III was proper.

Id. 407 N.E.2d at 158.

Thus, the plaintiff was left with an ineffective remedy. With no punitvie damages available to him on the claim which remained under Illinois law, there was no incentive for the insurer to change its practices. If an insurance company is held to no more than contractual damages for wrongful conduct in handling an insured's claim, while profiting by such misconduct, it has no incentive to change its illicit practices.

Several years later, the same practice, designed to cheat policyholders out of millions of dollars each year, was addressed in a state recognizing the tort of insurance bad faith and an appropriate punitive assessment was made for the purpose of deterring similar misconduct in the future. *Hawkins v. Allstate Ins. Co., supra.*

In *Hawkins*, the evidence showed that the same company was still using its "cleanup" deduction on every total loss collision claim for the purpose of increasing its profits at the expense of its insureds. The *Hawkins* Court found "the deceptive practices were established company policy" for up to 18 years before the time of trial. The practices were exposed and hopefully deterred in *Hawkins* only because punitive damages were permissible with the advent of insurance bad faith as a tort in Arizona in 1981.[9]

Unfortunately, there will always be the company or individual who will seize upon the opportunity to turn a

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[9] *Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981).

quick gain by imposing injury and deceit upon others. To those so disposed, punitive damages are the best response available. The availability of punitive damages in civil litigation will continue to serve the purpose of forewarning other defendants that their energy and finances are more prudently spent improving their own standards and conduct, and operating within existing legal principles. Those who are called upon to account for their conduct will always be assured their day in court, in accordance with historically accepted standards of civil due process. The present standards and procedure reconcile a defendant's interest in incurring monetary judgments only when supported by the evidence, with society's interest in insuring that corporate wrongdoing is both rectified and deterred in the future.

CONCLUSION

The doctrine of punitive damages as developed under state law is a legitimate and effective means of regulating undesirable corporate misconduct within a state's boundaries. Such awards are a proper regulatory function of the states. To restrict such awards based on the insurance industry's discomfort at being sanctioned by the state for misconduct would be to upset our tradition of federalism for all the wrong motives, and, in the process, to unfairly hinder a well-crafted system of public protection.

As said over 100 years ago in *Goddard v. Grand Trunk Ry.*, 57 Me. 202 (1869): "If the courts will . . . let the doctrine of exemplary damages have its legitimate influence . . . great and growing evils will be very much lessened."

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